No. 82-1677

Office-Supreme Court, U.S.
FILED
MAY 16 1983
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1982

CLAUDE DROLET,

Petitioner,

v.

JOHN VAN LINDT, as Chairman, and JOSEPH O'DEA and BERTRAM D. SARAFAN, as Members of the New York State Racing and Wagering Board, Division of Harness Racing,

Respondents.

On Petition For a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the confirmance by the Appellate Division of the New York State Supreme Court of the New York State Racing and Wagering Board's suspension of a trainer's license after a hearing found that the trainer was responsible for the administration of a stimulatory drug to a horse within forty-eight hours prior to its race presents a substantial constitutional question warranting this Court to grant certiorari?

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Respondents Van Lindt, O'Dea and Sarafan, as members of the New York State Racing and Wagering Board ("Board") respectfully request the Court to deny the petition for a writ of certiorari to review the unanimous confirmance, without opinion, of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department. (A copy of the Appellate Division Order is annexed to the Petition for a Writ of Certiorari as Appendix B)

Statement of the Case

On July 20, 1982 the Board summarily suspended petitioner's harness horse racing license after it was determined that a horse trained by petitioner had been administered the drug Clenbuterol within forty-eight hours before its race and had raced with the drug in its system, in violation of Board Rules 9 New York Code of Rules and Regulations ("N.Y.C.R.R.") §§ 4120.4(a) and (d)* and 4120.6.** Clenbuterol is a powerful respiratory stimulant which is not approved by the Food and Drug Administration for use in the United States in animal or man. It may not be legally sold in the United States. Petitioner's license was suspended pending a hearing and determination of the issues by the Board.

A hearing upon the charges was held on July 29 and 30, August 2 and October 19 and 20, 1982 before Hon. Bertram D. Sarafan, a member of the Board designated as hearing officer. Petitioner was afforded a full opportunity to testify and was represented by counsel. The hearing officer's find-

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* Board Rule 9 N.Y.C.R.R. ("Board Rule") § 4120.4 entitled "Prohibition" has two separate subsections which relate to the administration of drugs. It provides as follows:

> "Prohibition. No person shall, or attempt to, or shall conspire with another or others to:
>
> (a) Stimulate or depress a horse through the administration of any drug, medication, stimulant, depressant hypnotic or narcotic
>
> * * *
>
> (d) Administer any drug, medicant, stimulant, depressant, narcotic or hypnotic to a horse within 48 hours of its race." *Id.*

It should be noted that the foregoing rule was substantially modified, effective July 1, 1982.

** Board Rule § 4120.6, entitled "Trainers' responsibility" is quoted in the Petition at 2-3.

ings and conclusions, later adopted by the Board, were set forth in detail in a fourteen-page Report of Hearing Officer dated November 15, 1982. (A copy of the Report of Hearing Officer is annexed to the Petition for a Writ of Certiorari as Appendix E.) (References to pages of the Report appear here as "H. Rep.")

The hearing officer found that petitioner had administered a potent respiratory stimulant, Clenbuterol, to his horse within forty-eight hours before its race, and that the horse raced with the drug in its system in violation of Board Rules 9 N.Y.C.R.R. §§ 4120.4(a) and (d) and 4120.6. (H. Rep. 21a-22a)

The hearing officer carefully weighed all of the evidence presented and based his decision on that evidence. The evidence showed that the drug was purchased illegally, that it was administered by petitioner to his horse, that the horse raced with the drug in its system, and that it had been administered within forty-eight hours before the horse's race.

The evidence considered by the hearing officer included the eventual admissions of petitioner and his brother relating to the purchase of the drug and its use. He considered the testimony of Dr. Jack Henion and Dr. George Maylin of Cornell University regarding the identification of the Clenbuterol in the horse's urine, the development of the tests for Clenbuterol, the nature of the drug and their expert opinions on the time of its administration.

The hearing officer concluded that petitioner had violated both subsections (a) and (d) of Board Rule § 4120.4

and § 4120.6 as charged and recommended that the Board impose an appropriate penalty. (H. Rep. 22a)

On November 18, 1982, the Board adopted the Report of the Hearing Officer and concluded that petitioner's administration of the powerful respiratory stimulant, Clenbuterol, to his horse within forty-eight hours before its race constituted a serious violation of the foregoing Board Rules. Accordingly, the Board suspended petitioner's license for one year from July 20, 1982 (the original date of the suspension) through July 19, 1983.

Petitioner then commenced a special proceeding on November 24, 1982, which was transferred to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department. By Order, dated February 10, 1983, the Appellate Division, without opinion, unanimously confirmed the Board's determination and dismissed the proceeding. Petitioner then filed a motion for leave to appeal to the New York State Court of Appeals. By Order dated March 30, 1983, the Court of Appeals, without opinion, denied petitioner's motion for leave to appeal. On or about April 12, 1983, petitioner filed the instant petition for a writ of certiorari in this Court.*

Reasons for Denying the Writ

This case fails to present any novel or important question of law. Petitioner has not demonstrated that the pur-

* This petition represents the latest of petitioner's attempts to extend a stay originally granted at the beginning of the proceeding. His numerous applications for a further stay, made since he filed the instant petition, have been uniformly rejected by the Supreme Court, New York County and by the Appellate Division, First Department.

ported questions of law he raises meet any of the jurisdictional criteria governing review on certiorari set forth in 28 U.S.C. § 1257 or in Rule 17 of the Rules of the United States Supreme Court.

By this petition for a writ of certiorari, petitioner seeks to have this Court review a factual determination made by the New York State Racing and Wagering Board and confirmed by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department. Since the jurisdiction of this Court does not extend to the review of such questions, this petition is improper and should be denied.

It is well-settled that this Court will not exercise its jurisdiction merely to review a decision of a state court upon a question of fact. *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925); *Portland R. Co.* v. *Railroad Commission*, 229 U.S. 397, 412 (1913). Although this Court will review a state court's findings "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," *Fiske* v. *Kansas*, 274 U.S. 380, 385-86 (1927), this case does not fall within either of the foregoing exceptions.

Petitioner frames the main question presented as being whether the Appellate Division, by its confirmance without opinion of the New York State agency's decision, misconstrued the Trainer's Responsibility Rule, and did so in violation of petitioner's Fourteenth Amendment due proc-

ess rights.* (Petition at i) However, this is the first time that petitioner has attempted to raise a constitutional question.** It is axiomatic that this Court does not address constitutional questions which were not presented to and decided by the state court below. *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969).

The real issue raised by this case is one of fact, not of law, and hence should not be reviewed by this Court. *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925). The Board adopted the Hearing Officer's findings that petitioner administered the drug, Clenbuterol, to his horse and did so within forty-eight hours before its race, in violation of Board Rules §§ 4120.4(a) *and* (d), and the Trainer's Responsibility Rule. Petitioner seeks to create the impression that the Board's determination was based wholly upon his violation of the Trainer's Responsibility Rule. It is important to note that while the Board, in the proper exercise of its discretion, could well have based its determination on this violation alone, in point of fact its determination was also based upon several other serious violations of the Board's rules, cited above and in the Report of the Hearing Officer. (H. Rep. at 22a)

With regard to the Trainer's Responsibility Rule, the Board adopted the Hearing Officer's finding that "[i]t is difficult to understand how a person with [petitioner's] ex-

* The Trainer's Responsibility rule is contained in 9 N.Y.C.R.R. § 4120.6 and is quoted in the instant Petition at 2-3.

** Petitioner also attempts to raise, albeit in vague fashion, several other purported constitutional issues for the first time. (Petition at 7-9)

perience could not have been put on notice, by even a glance at the instruction sheet, of the true nature of the product." (H. Rep. at 19a) The hearing officer found petitioner's testimony regarding his belief the substance was a "food supplement" to be totally improbable. (H. Rep. 19a-21a) As the record indicates, and the hearing officer notes, at the very least, petitioner, "by the exercise of reasonable care . . . might have known or have cause to believe" that the substance he gave to his horse "could result in a positive test." (Board Rule § 4120.6, H. Rep. at 19a-21a) These factual findings, *inter alia*, were confirmed by the Appellate Division when it found that there was substantial evidence in the record to support the Board's determination.

The importance of these factual findings is emphasized by the language of the Trainer's Responsibility Rule. (Petition at 2-3) By virtue of the fact petitioner knew, or, at the very least, "by the exercise of reasonable care . . . might have known or have cause to believe" that the substance he gave to his horse "could result in a positive test", 9 N.Y.C.R.R. § 4120.6, he was in violation of the Trainer's Responsibility Rule. Thus, there exists no question of law which can be reached by this Court without reviewing and reversing these factual determinations, which, as the Appellate Division found, were overwhelmingly supported by substantial evidence in the record.

Petitioner places great emphasis on his continued erroneous contention that the Board knew of the presence of the drug in his horse prior to its race by virtue of a pre-race blood test and, in spite of this, forced petitioner to race the horse against his will. (Petition at 9) It is uncontroverted that the pre-race blood test of petitioner's

horse (which consisted of two blood samples) was negative. As a result, the track judges had no reason to "scratch" petitioner's horse. 9 N.Y.C.R.R. § 4120.12(g).* Petitioner's argument that he was forced to race his horse was considered and properly rejected by both the Board and the reviewing court below.

It is important to note that petitioner's focus on the participation of his horse in the race is also misplaced. He violated the Trainer's Responsibility Rule, along with two other Board rules, § 4120.4(a) and (d), well before the actual running of the race. Specifically, he violated these rules when he began and continued to administer the respiratory stimulant to the horse throughout the period before, and in connection with, the race, and within forty-eight hours before its race. Under the circumstances, petitioner violated the Board rules irrespective of the horse's participation in the race and scratching the horse would not have cured those violations.

The Board is charged with the regulatory responsibility for the racing industry which is highly sensitive in nature since it is the only sport in New York upon which wagering may be legally conducted. Petitioner's violations are anathema to racing and highly prejudicial to the best interests of racing. As this Court has recognized, the Board has a paramount interest in assuring the integrity of the racing carried on under its auspices. *Barry* v. *Barchi*, 443

* A horse may be withdrawn for a bona fide reason—one which did not exist in the instant case. Petitioner's statement to track officials that "rather than have any complications I would rather have horse scratched or whatever" does not constitute a bona fide reason to remove a horse from a race. Had he been forthright and admitted his horse's drugged state, it is highly likely the horse would have been withdrawn.

U.S. 55, 64 (1979). It is therefore essential for the Board to be able to act swiftly and appropriately, as it did here, to prevent abuse and loss of public confidence.

As demonstrated by the Appellate Division's unanimous decision, and the papers here, the administrative decision was based upon substantial evidence, the penalty imposed was authorized by law, and petitioner's contentions are patently frivolous and unsupported by the facts presented.

Moreover, the questions proposed by petitioner, even if properly subject to review, do not merit such review. Other than vague generalizations, petitioner has not pointed to any particular aspect of this case which is of importance, either to the public in general or to those who participate in harness racing. Petitioner's mistaken contention that his attempt to remove his horse from the race somehow exonerates him is based, at best, upon facts unique to his case. The Board has not been presented with this type of factual situation in the past with regard to a trainer's responsibility. Accordingly, petitioner's contention that this issue "has far reaching and important application nationally", (Petition at 10), is groundless. Further review by this Court would not serve the interests of justice.

Conclusion

The petition for a writ of certiorari should be denied, with costs.

Dated: New York, New York
May 11, 1983

Respectfully submitted,

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